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‘Putting cruelty first’: interpreting war crimes as human rights atrocities in US policy in Bosnia and Herzegovina

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Abstract:

This paper contributes to an understanding of the role of agency in a sociology of human right by examining how a small group of individuals interpreted, defined, and instantiated ‘hard’ human rights, or those atrocities associated with war crimes and crimes against humanity. Using political theorist Judith Shklar’s perpetrator-focused framework of ‘putting the prevention of cruelty first’, we explore the role of agency in the construction of human rights through the empirical lens of US war crimes policies around the 1995 Dayton Peace Accords for Bosnia-Herzegovina. We draw on US State Department documents, and on interviews with key participants in the Accords, to argue that a richer sociology of human rights—seen as socially situated and embedded—requires a fuller appreciation of the experiences of key social actors in those social locations in which human rights are articulated, interpreted, and actualized.

Key words:

Bosnia-Herzegovina, Hard Human Rights, War Crimes

This paper considers the relatively neglected role of agency in sociological theorizing on human rights. It does so by exploring how a small group of individuals interpreted and instantiated human rights through a perpetrator-focused view of ‘hard’ human rights—or those atrocities associated with war crimes, crimes against humanity, and genocide, such as physical brutality, extra-judicial summary executions, war rape, detention and torture, and coerced displacement, among other abuses.¹ Drawing on political theorist Judith Shklar’s call in *Ordinary Vices* to ‘put cruelty first’—or to prioritize the prevention of these state-led human rights atrocities above all else because the ability to inflict mass levels of fear, intimidation, and brutality often rests uniquely with the perpetrator state and its agents or instruments of coercion—we show how such an approach to hard human rights might offer an alternative way of contextualizing the sociological role of agency in the construction, interpretation, and instantiation of human rights.

We try to explicate what such an approach might look like empirically through an analysis of US policies around war crimes in Bosnia-Herzegovina in the early 1990s, focusing in particular on policies leading to the November 1995 Dayton peace talks,

which ended the three-year Bosnian war. Analysis of State Department documents released under the Freedom of Information Act (FOIA), and interviews with key architects of the Dayton Peace Accords, suggest that a small, informal ‘war crimes working group’ of lawyers and mid-level officials emerged within the lower bureaus of the State Department in the early 1990s. These social actors analysed and interpreted war crimes as human rights claims; they redefined mounting human rights atrocities as breaches of political citizenship by the perpetrator state. This distinctive political construction of hard human rights by this particular group of US elites had the effect of shifting the human rights’ narrative away from a victim-centred framework based on dignity or frailty, to one that was perpetrator or state focused. In this way, mid-level State Department officials’ social agency served as an important location or site of human rights construction and embeddedness.

We draw primarily on US State Department documents, UN Commission of Experts Reports, and in-depth interviews with thirteen individuals, including key architects of the Dayton process and US human rights policy. State Department archival documents regarding US Bosnia policy between December 1991 and February 1997, and released under the US FOIA, contain 213 reports, policy analyses, internal memos, telegrams, and legal briefs concerning human rights and war crimes. They are a partial release of a larger repository that remains classified (awaiting further FOIA requests), so we stress that our assessments are necessarily limited and tentative, in anticipation of the full archival release.

Our approach was premised on the assumption that the practice of human rights lies in their embeddedness in social locations of political power, and in the ways in which this power is exercised, legitimated, or constrained; put differently, we sought to examine the political culture and institutional locations that shape the categories available for the construction of expertise and knowledge around human rights and war crimes (see Fourcade, 2009; Camic et al., 2011). How do structures of power deal with evidence of mass atrocity, and in particular, how did the State Department become a site of human rights knowledge production? After a theoretical contextualization, we explore the social agency of this ‘war crimes working group’ and their application of ‘putting cruelty first’, first in terms of an interpretive narrative of the perpetrator, then of the victims, and finally through their construction of war crimes as politically-inflected human rights violations.

A perpetrator-centred framework and agency in human rights' theorizing

Sociological scholarship working toward a sociology of human rights has explored, among other things, the power or organizational arrangements underpinning human rights claims (Sjoberg et al., 2001), human rights universalist foundations (Turner, 1993, 2006), its discursive dimensions (Woodiwiss, 2005), the normative nexus between human rights and citizenship (Somers and Roberts, 2008), its potential for a developing a public sociology of human rights (Burawoy, 2006; Hagan et al., 2006), and the theoretical and practical implications of qualitative versus quantitative approaches to human rights (Hafner-Burton and Ron, 2009). And yet it has paid comparatively little attention to the ways in which social agency can define human rights and produce a social knowledge around them, that is, to how rights may be interpreted and embedded by social actors (see discussion in Hynes et al., 2010: 820-2). Our data suggests that a particular interpretation of human rights emerged in a particular social context as a value constructed and defined by a key social constituency, one whose role in interpreting and shaping rights was determinative. More specifically, a group of international/human rights lawyers in mid- and low-level bureaus within the State Department effectively merged 'war crimes' and 'human rights' by viewing them through a politically universalist, state-centred prism that made the prevention of cruelty a policy priority. While this interpretation reflected a distinctive social contract rights culture as vernacularized through the US legal profession in the early and mid-1990s (Henkin, 1979; Lillich, 1990; Koh, 2003), in practice, it also constructed a narrative around war crimes' evidence that moved away from a universalist focus on victims' human dignity, and towards a more perpetrator-centred, political narrative in which citizenship rights were violated by a state held to be accountable.

So in sociologically acknowledging the utility of human frailty or vulnerability as an embodied universalist foundation or framework for human rights, by conceptualizing how the precariousness of citizens' rights can be related to the human rights of individuals, this framing might also address the values that arise from the recognition of shared vulnerability in the face of organized killing and systematic or extreme violence (Turner, 1993, 2006: Ch.1). It suggests, therefore, a distinctive theoretical lens with which to view social agency within a broader sociology of human rights.

It does so by opening the possibility of viewing agency through a particular normative lens: here, we draw on Shklar's (1984) concept of 'putting cruelty first', a concept that is (a) tethered to the prevention of perpetrator, state-led human rights

atrocities, and (b) premised on the recognition that the ability to inflict certain levels of fear, intimidation, and violence often rests uniquely with the state and its agents, institutions, or instruments of coercion. Shklar (1984: 237-8) begins with the empirical observation ‘that the power to govern is the power to inflict fear and cruelty’; we must take this power seriously, or ‘hate cruelty cruelly’, because of its profoundly corrosive social, moral, and political effects. ‘Putting cruelty first’ is premised on an assumption that the actualities of state-driven fear, coercion, and abuse are so abhorrent, and their consequences so grave and de-humanizing, that they must be prioritized and prevented before all other considerations. On this view, the prevention of the fear caused by state brutality is itself irreducible and requires no further justification.

‘This is not the liberalism of natural rights’, Shklar (1984: 238) observes, ‘but it underwrites rights as the politically indispensable dispersion of power, which alone can check the reign of fear and cruelty’. Ultimately, of course, this requires some version of representative constitutional democracy with institutional checks and constraints against state brutality. But in the immediate context of war crimes and genocide the urgent aim is to protect the most vulnerable against appalling cruelties, and to limit the ability of those who hold these coercive instruments of physical brutality from using them with impunity. To be sure, putting cruelty first as a way of actualizing hard human rights claims involves ethical and political compromises, and practical policy limitations, as we will see. But it nevertheless offers a useful analytical framework for articulating an agency-centred sociology of hard human rights that is as focused on the perpetrator’s capacity for cruelty as it is on the victim’s human dignity or vulnerability.

In practice, this articulation of human rights, and indeed its instantiation, involved three closely related interpretive moves by the lawyers in the State Department, which redefined war crimes *qua* hard human rights abuses. First, hard human rights claims were instantiated and concretized when the victim was conceived not simply as a moral being, but as a political being whose political agency in the conflict needed urgent articulation (Shklar, 1984: 18). Second, just as the human rights victim was seen as a political being, a human rights claim for social protection was re-conceived as a political claim, reliant on state institutions or agents for its enforcement or denial. Treating the victim’s rights claim for protection as a constitutively political demand suggested a broader sociological conception of human rights that began to move away from its moral universalist, apolitical mooring around human dignity, into the politicized and violent space between the victim and the perpetrator/state. As a consequence this implied,

thirdly, that if the human rights claim was not to remain abstract or disembodied, but actualized and instantiated, then protecting vulnerable citizens from the state's instruments of cruelty required something more than a moral, legal framework, or 'liberal legalism' (Bass, 2002; Hagan, 2003), but also a framework that offered a politically legitimate constraint on the state's power to brutalize, i.e. a theory of the state's ability to commit mass atrocity. In effect, US officials' analysed hard human rights through a social contract or rights-based prism, which defined the responsibility of government to its citizens and articulated a basis for legitimizing a human rights' claim for protection based on the properties (nationalist) and practices (organized ethnic cleansing) of the perpetrator (the state).

A domestic human rights constituency emerges

Following the break-up of Yugoslavia and the secession of Croatia and Slovenia in 1992, a three-year ethnic conflict—largely orchestrated by an aggressive nationalism in Serbia and a response by Croatia—spread into Bosnia-Herzegovina among Bosnian Serbs, Croats, and Muslims (later known as Bosniaks). The violence resulted in the deaths of more than 250,000 Bosnians and the forcible displacement of 2.2 million. From the first hostilities a number of US, EU, and UN peace attempts had tried—and failed—to bring an end to the violence, but in November 1995 the US-led Dayton Peace Accords resulted in a permanent cease fire and a politically redesigned Bosnian state.

The defining feature of the war had been ethnic 'cleansing' (*čišćenje terena*), a term that originated during the conflict (Silber and Little, 1996: 171), and that referred to the mass rendering of an area ethnically homogenous by use of force or intimidation, and involving various tactics to effect population displacement, such as laying siege to cities and indiscriminately shelling civilian populations; starving populations of food and supplies; executing non-combatants; establishing concentration camps where thousands of prisoners were summarily executed and tens of thousand were subjected to torture and inhumane treatment; employing rape camps as tools to terrorize and uproot populations; and razing entire villages (United Nations, 1994).²

Initially, the Clinton Administration's policies were confused, ineffective, and characterized by a palpable sense of drift (Chollet, 2005: Ch. 1-5). But the horrific nature of the mounting atrocities were being documented in real time from early 1992 by the State Department, through refugee interviews and satellite images. As a result, US policy began to develop around efforts to set up a war crimes tribunal, something that human

rights organizations had also been advocating. These efforts were the product of a particular set of individuals—or a human rights constituency—that emerged within the smaller bureaus of the State Department, and whose interpretation or official narrative of Bosnian violence was to construct it as a politically-inflected fusion of war crimes with human rights.

The Clinton Administration's policy drift and its inability to bring an end to the ethnic violence had, however, led to frustration among mid-level officials and Balkan specialists, and eventually to the protest resignations of several junior State Department policy officers who were intimately familiar with the evidence of widespread brutalities.³ But James O'Brien, a junior staff lawyer in the State Department's Office of the Legal Adviser, had been given the usually quiet war crimes portfolio. In early 1992, as the Bosnian war exploded, and as he read the first press and intelligence reports detailing evidence of atrocities and ethnic cleansing, he consulted with State Department language officers for translations, and he began to voice the argument that these were, in fact, war crimes. O'Brien felt his unique vantage point at the war crimes desk allowed him to see Nuremberg as the policy precedent for moving on the material.⁴ Under the direction of his superior Michael Matheson, then Principal Deputy Legal Advisor, and with a small group of junior staffers, they guided this idea through political channels and sought the assistance of other countries.

They proposed a tribunal under a UN Security Council mandate, and O'Brien, and State Department Attorney-Advisers Robert Kushen and David Scharf drafted its statute. In early 1993 the ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY) was established (cf. Scharf, 1997: Ch. 4; Scharf and Williams, 2010: Ch. 9, 10).⁵ It was criticized as both an instrument of US politics and as a weak substitute for a determined military or diplomatic response to the atrocities, though more narrowly it was hoped that it might deter further human rights violations, raise the costs of non-compliance, and lay the ground for post-conflict accountability (Shattuck, 1999: 31). Importantly, however, war crimes were becoming bound to a human rights framework through the interpretive work of the 'war crimes working group'.

In fact the Tribunal also crucially laid the premise for the emergence of a new narrative of the conflict within the State Department, and gradually for a more explicit policy around war crimes as human rights atrocities. As the cumulative stream of evidence of atrocities and ethnic cleansing filtered its way through the State Department and intelligence agencies, the idea emerged that war crimes evidence and support for the

Tribunal could be vehicles for gaining leverage over the war. This idea gained momentum in a particular social location: among a small ‘human rights coalition’, or ‘war crimes working group’ that informally coalesced among mid-level officials and lawyers in the State Department Legal Adviser’s office and its Human Rights Bureau, a number of whom were active in setting up and supporting the ICTY (Hagan, 2003: 47; Shattuck, 2003: 125, 130, 154).

Arguments were made that human rights could be used as a pillar of geopolitical diplomacy (Albright, 2003: Ch. 12, 13), that peace and justice were not mutually exclusive (Holbrooke, 1998; Shattuck, 2003) and, as O’Brien would maintain, that they effectively needed a Realist school of human rights.⁶ The prosecution of war crimes and hard human rights abuses would not simply be moral idealism but part of a *realpolitik* strategy to push obstructionists and perpetrators to the side in order to end the war. UN Ambassador Madeleine Albright was a strong supporter of the idea, Secretary of State Warren Christopher broadly backed it, and soon Deputy Secretary of State Strobe Talbott and Anthony Lake at the National Security Council also approved its thrust (Holbrooke, 1998: 189). It created tensions around tactics, just as it raised ethical, legal and political ambiguities about whether to link war crimes to sanctions relief or to the substance of the peace negotiations (Albright, 2003: Ch.12; Shattuck, 2003: 130-1, 141). But as John Shattuck (2003: 201), Assistant Secretary of State for Democracy, Human Rights, and Labor, later wrote, ‘human rights were by definition at the center of every issue that the [Dayton] peace conference would face’, so US policy was to give hard human rights atrocities a role in the political strategy to end the conflict.

This framing derived in part from the composition of the policymakers themselves. A number of officials responsible for Bosnia policy had personal family backgrounds in East Central Europe or the Balkans. Albright’s aggressive activism, for instance, was intimately bound to her own personal experiences as an émigré from East Central Europe’s ethnic violence, and from close family connections to Yugoslavia;⁷ Holbrooke was of mixed Central European Jewish background; and Paul Szasz, who had served the UN as an expert on international law and became a legal adviser to the lawyers crafting Dayton,⁸ was a Hungarian refugee from 1939. But more generally, many were young lawyers with backgrounds in human rights law or activism, international law and diplomacy, or constitutional law and civil rights.⁹ In fact, of the forty people working in the Tribunal’s Office of the Prosecutor, twenty-two were lawyers and investigators sent by the US; they had deep experience in human and civil rights activism, in and out of

government, and they contributed a key leadership cohort to the ICTY's 'distinctive Anglo-American atmosphere' (Hagan, 2003: 64-8).

The lawyers and low-level officials that loosely comprised this war crimes working group produced a state-centred narrative of ethnic cleansing and hard human rights atrocities focused on the perpetrators. This was informed by three factors. First, Moravcsik (2005: 154-66) is right that American exceptionalism with respect to human rights is contingently dependent on specific domestic political cleavages, and especially on the presence or absence of a domestic liberal constituency around human rights. Such a constituency emerged in the early 1990s within the lower levels of the State Department bureaucracy. Second, these officials' experiences reflected a normative commitment to the rule of law within a liberal legalist interpretive framework, as epitomized by their strong and unqualified support for the Tribunal (Shklar, 1986; Bass, 2002: esp. Ch. 1; Hagan, 2003). And third, their understanding of the violence in Bosnia-Herzegovina was explicitly political, not merely legalist: they interpreted evidence of war crimes as a series of politically orchestrated ethnic policies, not just as legal human rights violations; they viewed ethnicity as the content, not the driver, of political atrocities.¹⁰ They built a conceptual framework around the perpetrator, the dynamics of the atrocities, and the politically-constituted violent and dynamic space between perpetrator and victim—highlighting the importance of understanding the social locatedness of the construction of human rights.

The application of 'putting cruelty first'

Our research suggests that US war crimes policy involved three related elements: the use of war crimes as evidence of political culpability to exclude indictees from negotiations and as post-conflict lustration; the collection of refugee/IDP interviews to support the ICTY; and the construction of a political framework around ethnic cleansing.

A narrative of the perpetrators

If pleas to make human rights central to US policy had been dismissed as idealistic by some administration officials, with the collapse of five different peace plans the use of war crimes indictments to remove radical or obstructionist leaders likely to derail future negotiations began to look quite realist. This amounted to what Shattuck now refers to as 'war-criminalectomy'.¹¹ As a matter of formal policy the US leveraged the ICTY's July 1995 indictments of Radovan Karadžić and Ratko Mladić to exclude them from the

Dayton process (Chollet, 2005: 87-8). Indeed the Tribunal worked on the same principle: politically isolate indicted war criminals from positions of power, even if they were not in custody (Matheson, 2006: 201).

But this was not pursued consistently or unambiguously—highlighting some of the problems inherent in a ‘putting cruelty first’ framework. Holbrooke had been trying to isolate the Bosnian Serb leadership from the final Dayton negotiations since early 1995, both for their extremism and for tactical reasons—to reduce the number of parties at the table, given that this was one of the reasons for the failure of previous Contact Group efforts.¹² So a war-criminalectomy was one way to do it. And yet US negotiators had met with Mladić and Karadžić several times before Dayton, and the fact that they were negotiating with Slobodan Milošević was itself seen as both subverting the work of the Tribunal and legitimizing his complicity, if not culpability, in the mass atrocities. Moreover, excluding Mladić and Karadžić from negotiations might also have been illegal under international law because they had only been indicted, not convicted.¹³ To all of this the response was pragmatically realist: no amnesties were offered as a condition of negotiations and, as Holbrooke argued, ‘only the parties to the terrible conflict could end it...you can’t make peace without Milošević’ (quoted in Anonymous, 1996: 253). War crimalectomy defined political—not just legal—culpability.

This also had secondary lustration effects, although here, too, the impact was mixed. The civilian implementation Annex of the Dayton Agreement gave the newly established Office of the High Representative (OHR) the authority to prevent indicted war criminals from holding political office, and it had a certain utility. Together with the work of the Tribunal, lustration constituted a wider attempt at transitional and restorative justice, and it helped introduce new rules into post-conflict political culture. It was thought that by removing the former communists-turned-nationalists from political life, the indictments could create space for more moderate forces to emerge (Koh, 2003: 1505).

But NATO did not want responsibility for arresting war criminals, so in the first several years very few were indicted, much less arrested and tried. After Dayton, suspected war criminals remained at the heart of a network of criminal activity that made postwar reconciliation exceedingly difficult. Dayton did not provide enforcement authority. The 1997 Bonn Powers allowed OHR to continue ‘war crimalectomies’ by dismissing public officials for treaty non-compliance (‘anti-Dayton activities’) or for war crimes indictments.¹⁴ But the Bonn powers did not have a legal basis in Dayton, and in

fact elements of this lustration policy have been successfully challenged in Bosnian courts on human rights grounds.¹⁵

The failure to arrest more war criminals had enormous implications for the return or resettlement of hundreds of thousands of forcibly displaced persons. Dayton's Annex Seven had outlined extensive protections for refugees and IDPs, including the rights of return and, for the first time in international law, property restitution (Leckie, 2007: 31-4). Support for the view that significant returns were possible was available in numerous State Department reports indicating that even the most traumatized refugees wanted to return to their homes, as long as it was safe and war criminals were prosecuted; indeed most blamed political elites for the brutalities, not their neighbours.¹⁶ So there was a brief post-war 'psychological window' of time in which substantial return might have taken place.¹⁷ But involuntary return was also protected, i.e. the right not to return to the same conditions that had caused one to flee. So safe return was deeply affected by whether or not suspected war criminals were removed from a particular area (International Crisis Group, 1998).¹⁸ But because the Tribunal was too slow to indict, and because the first indictment, Duško Tadić, was a largely symbolic low-level perpetrator, the failure to indict quickly and arrest more—and more high profile—war criminals meant that substantial refugee return never materialized.

In summary, then, the exclusion and lustration of indicted war criminals was considered politically necessary and State Department press guidance reports emphasized that 'prosecuting war crimes [was] in the long term interest of peace in the region'.¹⁹ Despite its potential policy usefulness in the prevention of atrocities, as implemented it was insufficiently mindful of the underlying power structures of Bosnian politics and society and of the politics of displacement and return. War criminalectomies (and Dayton's General Framework Agreement) were not targeted enough to subvert or dismantle the centres of power and patronage apparatuses in Bosnia-Herzegovina that had been the institutional support for the war. This would become something of a lesson-learned.²⁰ Although they had not crafted a specifically tailored Balkan instrument, the effect of the war crimes working group's attempts to put cruelty first had shifted the policy centre of gravity from the humanitarian universalism of human rights to a politically inflected universalism focused on state-led atrocities. War criminalectomy policies were framed around perpetrators' political culpability as much as their legal violations of human rights.

A narrative of the victims

In 1992 the UN Security Council established a Commission of Experts and a Special Rapporteur of the Commission on Human Rights. Both were charged with collecting and investigating evidence of war crimes. So a second US policy component was to enhance these evidence-gathering bodies by directly commissioning US embassy officials and investigators to conduct interviews in refugee camps in, for instance, Ankara, Vienna, Zagreb, Bonn, and Belgrade. The State Department's Human Rights Bureau deployed officers to collect evidence and interview refugees, and in one year alone it produced five human rights reports based on embassy field reports, interviews with refugees, and the findings of human rights organizations (Shattuck, 2003: 131). By mid-1995 the US embassy in The Hague had become a transfer point for information to be passed to the Tribunal, just as US intelligence agencies forwarded information to the legal advisor's and lead prosecutor's offices at the Office of the Prosecutor (OTP) (on the latter, Hagan, 2003: 138).

One of the most important sources for State Department interviews was the Kirkareli refugee camp in Turkish Thrace. 'Emboffs' (Embassy officials) were able to enter where the ICRC was not, and their interviews with Bosnian Muslim refugees carefully documented the most horrifying 'specific and gross human rights abuses': people burned out of their homes, concentration camps for the systematic rape and impregnation of girls and women, beatings, mutilations and de-capitations, all manner of humiliating torture, summary executions of civilians, and other hard human rights atrocities. Importantly, credible witnesses were able to name specific perpetrators as people that they knew—just as many owed their survival to the assistance of 'lone Serbs'—and they provided crucial information on chains of command in the detention and rape camps.²¹ Reports from Belgrade, Zagreb and Vienna Emboffs similarly documented details of brutalities, including fatal beatings, male rape and sodomization, corpses and mutilated bodies loaded into trucks, descriptions of grave site locations, and in one interview the fatal beating of a six year old child.²²

Admitting the difficulties of keeping up with the 'enormous magnitude of human rights violations',²³ US officials forwarded these details and the names of credible witnesses to the Commission of Experts and to the OTP, with the explicit purpose of preparing for the war crimes trials.²⁴ Because the prosecution of war criminals was 'an important US policy objective',²⁵ corollary practices involved (i) tracking the movements of refugees/witnesses willing to testify, (ii) safely airlifting the most vulnerable to the

Tribunal, and (iii) commissioning a US Department of Defense (DoD) airlift of the Bosniak delegation to discuss war crimes investigations.²⁶ For instance, in March 1994 O'Brien drafted a memo to request that a US interagency team (a DoD prosecutor, an FBI forensic artist, and State Department representatives) be sent to interview refugees from Brčko, which had been ethnically cleansed in April-July 1992. The proximate aim was to work under the auspices of the UN War Crimes Commission and to assist the work of the Tribunal's Chief Prosecutor, but the wider hope was that 'our trip to interview witnesses [in Germany and Denmark] will prompt host countries to work actively in preparing information for the prosecutor'.²⁷

The effect of these policies was two-fold. Most immediately, the experiences of war crimes victims were inserted into the conflict, into the work of the Tribunal, and into the broader US diplomatic strategy toward Bosnia-Herzegovina. US officials' interpretation of victims' narratives offered them a degree of political agency in a moment in which it was existentially threatened. And secondly, a particular narrative among State Department officials was consolidated: it held that these war refugees were not merely abstract victims of human rights abuses, but more substantively, they were viewed as victims of nationalist policies. This strengthened the narrative of the war as politically manufactured and driven by the perpetrator's (state's) capacity for cruelty.

War crimes as politically inflected human rights

As the survivors' accounts came in, and as more reports from human rights organizations and the ICRC were made available, desks within the State Department, including its intelligence bureau, or the Bureau of Intelligence Research (INR), added this evidence to their own internal field reports. The documentary evidence suggests that they continually reassessed the fundamental political and policy dynamics of ethnic cleansing, including with the use of ethnographic mapping and satellite imagery analysis. These assessments were folded into eight comprehensive war crimes reports.²⁸ The result was a set of discrete assessments that were fundamentally political in their human rights implications. The narrative was politically universalist: war crimes, as human rights violations, were political atrocities that illegitimately victimized citizens.

The assessments concluded that the policies of ethnic cleansing involved 'victims of nationalist policies',²⁹ 'efforts to destroy social structures',³⁰ the 'rape and abuse of women as an instrument of war',³¹ a coordination, scale, intensity and orchestration of violence that was not reversible,³² brutalities that 'did not arise spontaneously or by

happenstance’,³³ ‘evidence of high level complicity’ in the cruelties,³⁴ ‘acts of genocide’,³⁵ and the use of various forms of ethnic cleansing as ‘deliberate levers of policy’³⁶. In other words, this was a war and it was fought with ethnic strategies. For ICTY purposes, US reports of refugee interviews generally organized the substantive violations under legal human rights categories and sub-categories (e.g. political and extrajudicial killing, disappearance, arbitrary arrest and detention, right of association). But the organizing analysis was political, not legalistic. So, for instance, a November 1994 draft report noted that ‘ethnic cleansing...bears attributes of all categories of human rights abuses’, but concluded that this was fundamentally driven by ‘Serb [military and paramilitary] atrocities and acts of violence [that] were a matter of low-level loss of control or high-level policy’.³⁷

The diffuseness of this kind of political analysis was most evident in three key substantive areas. First, State Department analysts concluded that the vast majority of the hard rights abuses were attributable to Bosnian Serbs with complicity from Belgrade—countering both the European view of the conflict as a civil war, and the human rights NGO’s tendency for apolitical balance. Based on a number of field reports, State Department analyses highlighted Bosnian Serb-Belgrade command structures, systematically executed policies, methodical planning, and patterns in the violence—all of which helped to establish not only criminal liability for the Tribunal, but also political responsibility.³⁸ Jon Western, an INR analyst, revealed American thinking: ‘Milošević was never going to call up his henchmen and say, ‘Go commit genocide.’ We had to develop the case by showing the systematic nature of the campaign. Only by working backwards could we show [genocidal] intent’ (quoted in Gratz, 2011: 411). Second was the conclusion that ethnic cleansing involved a ‘routinized campaign to destroy the Bosnian Muslim community’;³⁹ that community leaders were systematically targeted based on municipal lists, both to send a message and to ‘figuratively decapitate Muslim society’; and that patterns of ‘clearance’, displacement and resettlement reflected orchestrated policies.⁴⁰ And third, they repeatedly characterized the multiple rape and abuse of girls and women in at least sixteen ‘rape camps’ primarily as an instrument of war, not simply as a human rights violation. This prompted USAID to mobilize very specific interventions—learned, in part, from the treatment of trauma following the Vietnam War—to support the immediate and long-term needs of victims through, *inter alia*, support for local private voluntary organizations, hospital partnership programmes, and

programmes to train and upgrade the treatment of trauma and by making available child psychiatrists.⁴¹

In short, the State Department's internal analyses were conceptually anchored politically, not in the legal language of human rights. The analyses focused on the dynamics of that violent space between perpetrator and victim. It was an interpretive formulation of hard human rights not based on universalist, constitutive properties of the victim, but one that re-balanced the conceptual focus to a perpetrator-centred political universalism because of a recognition of the state's ability to inflict mass atrocity.

Conclusion

Our evidence suggests that key lower level US State Department officials of the informal 'war crimes working group' constructed a narrative of (i) hard human rights violations in statist terms, of (ii) Bosnia's victims as citizens requiring political agency in the face of atrocities, and of (iii) their human rights claims for protection as politically constituted—all anchored around a 'putting cruelty first' policy focused on the state's singular capacity for organized brutality, and on an interpretation of 'war crimes' *qua* 'human rights abuses'. 'War criminalectomies' were used to remove indicted war criminals; 'ethnic cleansing' was interpreted substantively as an organized state-led effort to 'destroy the social structure' of nationality groups, rather than as a series of human rights abuses;⁴² and the political agency of Bosnia's refugees and displaced was under illegitimate political threat and in need of urgent articulation and protection.

In short, these 'putting cruelty first' interpretations had the effect of building a narrative of hard human rights atrocities around the perpetrator's *political* culpability, not simply around the human dignity of victims of rights atrocities. They empirically acknowledged Shklar's admonition that the power to coerce, to inflict fear, violence, and cruelty rested disproportionately with the state and its agents and institutions. In short, their 'putting cruelty first' policy was as concerned with defining state cruelty as it was with articulating victims' vulnerability or dignity. It had important limitations, of course: as a way of actualizing hard human rights claims, it was prescriptively sobering because it involved ethical contradictions, political compromises, and the practical tradeoffs of imperfect policy choices.⁴³ And while a perpetrator focus did accord political voice to rights claims in moments of mass atrocity—precisely when those voices were the most existentially threatened—it nevertheless moved away from the moral universalism that usually anchors human rights discourse.

Yet more importantly, this particular vernacularization of human rights—by this particular group of social actors—also demonstrates the value of better understanding the role of agency in a broader sociology of human rights: the determinative social agency of the ‘war crimes working group’ exemplified the social situatedness or locatedness of human rights in that moment, particularly as they constructed hard human rights as a set of normative political values, and with a greater sensitivity to the perpetrators of atrocities. Put differently, a richer and deeper sociology of human rights requires a more rounded appreciation of human rights as socially situated, and reflective of the subjective experiences, interpretations, and, indeed, agency of key social actors in those social locations in which rights are actualized and socially embedded.

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Notes

¹ We refer to these as ‘hard’ human rights to distinguish them from those ‘softer’ human rights and protections around social provisions (cf. Hagan et al., 2006).

² United States Department of State [USDS], Freedom of Information Act [FOIA], Declassified/Released Document Collections: Bosnia, <http://foia.state.gov/SearchColls/> (Retrieved: 30 April 2011), Document 32: Report: ‘Bosnia: Serb ethnic cleansing’, 4 August 1995 15pp.

³ George Kenny, deputy officer on the Yugoslavia desk, resigned in August 1992; desk officers Marshall Freeman Harris and Steve Walker, and INR war crimes investigator, Jon Western all resigned in 1993.

⁴ Interview with James O’Brien, lead lawyer and drafter of Dayton’s ‘General Framework Agreement’, 28 April 2010.

⁵ The Legal Adviser’s office also provided substantial staffing, financial assistance, and forensic experts.

⁶ O’Brien interview.

⁷ Albright’s brother was born in Yugoslavia, her father had been a diplomat in Belgrade, and she had lived there and studied it as an academic (Albright, 2003: 178).

⁸ Interview with Gro Nystuen, legal advisor to EU Special Envoy to the Former Yugoslavia Carl Bilt and author of Dayton’s ‘Human Rights Annexes’, 14 June 2010.

⁹ We thank James Goldgeier and a British official (whose name we withhold) for discussion.

¹⁰ Interviews with Derek Chollet, Office of the Historian, Department of State, 1 September 2010; Laurel Miller, assistant legal advisor to Roberts Owen, 1 September 2010; James Pardew, Director of Balkan Task Force, Department of Defense, 3 September 2010; and Roberts Owen, the lead legal advisor at Dayton and a former State Department Legal Adviser, 5 November 2010.

¹¹ Interview with John Shattuck, Assistant Secretary of State for Democracy, Human Rights and Labour, Department of State (1993-1998), 6 August 2010.

¹² USDS, FOIADoc. 73: Telegram US Mission Geneva to US Liaison Office Skopje, 20 October 1994, p.2. O’Brien interview.

¹³ Roberts Owen suggested this to us. Owen interview.

¹⁴ See <http://www.ohr.int/decisions/removalssdec/archive.asp?fln=on&m=&yr=1999>, and <http://www.ohr.int/decisions/war-crimes-decs/archive.asp?m=&yr=2003>. Retrieved 21 March 2011.

¹⁵ Nystuen interview.

¹⁶ USDS, FOIADocs: 203: Telegram Zagreb Embassy to State, 7 January 1993; 187, 179: Telegram Ankara Embassy to State, 16 March 1993, 9 April 1993; 147: Telegram Istanbul Consulate to State, 14 September 1993; 118: Telegram Prague Embassy to State, 8 February 1994; 72: Telegram Vienna Embassy to State, 16 November 1994.

¹⁷ Interviews with UNHCR Assistant Field Officer, Armin Hošo, and OSCE Property Rights Adviser, Amela Tandara, Sarajevo, 2 February 2011.

¹⁸ Interview with Norwegian Ambassador to Bosnia-Herzegovina, Jan Braathu, 2 February 2011; Hošo interview.

¹⁹ USDS FOIADocs: 41: Telegram State to All Near Eastern and South Asian Diplomatic Posts, 27 July 1995.

²⁰ O’Brien and Nystuen interviews.

²¹ USDS FOIADocs. 187: *op. cit.*; 179: *op. cit.*; 147: *op. cit.*

²² USDS FOIADocs. 208, 190, 105, 102, 100, 99, 98, 97, 89: Telegrams Zagreb Embassy to State, 13 August 1992, 3 March 1993, 28 February 1994, 2 March 1994, 4 March 1994,

7 March 1994, 8 March 1994; 97: 8 March 1994, 28 March 1994; 205, 188, 93: Telegrams Vienna Embassy to State, 25 November 1992, 12 March 1993, 17 March 1994; 202: Telegram State to Vienna Embassy, 9 January 1993; 130: Telegram Belgrade Embassy to State 29 December 1993.

²³ USDS FOIADocs. 136: Telegram Vienna Embassy to State, 29 October 1993.

²⁴ USDS FOIADocs. 203: *op. cit.*

²⁵ USDS FOIADocs. 95: Telegram US Mission Geneva to State, 11 March 1994; 84: Telegram State to All Diplomatic and Consular Posts, 29 April 1994.

²⁶ USDS FOIADocs. 203: *op. cit.*; 164: Telegram Istanbul Consulate to State, 11 June 1993; 153: Memorandum State to DoD, 19 July 1993; 84: *op. cit.*; 78: Memorandum State to DoD, 3 August 1994.

²⁷ USDS FOIADocs. 101: Telegram State to Bonn Embassy, 4 March 1994.

²⁸ USDS FOIADocs. 126: Telegram State to Vienna Embassy, 25 January 1994; 32: *op. cit.*

²⁹ USDS FOIADocs. 130: *op. cit.*

³⁰ USDS FOIADocs. 126: *op. cit.*

³¹ USDS FOIADocs. 117: Telegram Belgrade Embassy to State, 9 February 1994.

³² USDS FOIADocs. 54: Paper: 'Ethnic cleansing and atrocities in Bosnia', 1 July 1995 6pp.

³³ USDS FOIADocs. 67: State Department Statement re. War Crimes Tribunal, 28 December 1994.

³⁴ USDS FOIADocs. 200: Memorandum, 11 January 1993.

³⁵ USDS FOIADocs. 122: Bureau of European Affairs Press Guidance 3 February 1994

³⁶ USDS FOIADocs. 83: Telegram Vienna Embassy to State, 16 May 1994

³⁷ USDS FOIADocs. 72: *op. cit.*

³⁸ USDS FOIADocs. 212: Telegram State to Frankfurt Consulate, 7 December 1991; 179: *op. cit.*; Telegrams Belgrade Embassy to State, 167: 14 May 1993; 151, 12 August 1993; 147: *op. cit.*; 130: *op. cit.*; 125: EUR Press Guidance, 28 January 1994; 33: Shattuck memo to Secretary of State 4 August 1995.

³⁹ USDS FOIADocs. 200: *op. cit.*; 60: Report: 'Serbia' 4 April 1995 4pp.

⁴⁰ USDS FOIADocs. 122: *op. cit.*; 118: *op. cit.*; 72: *op. cit.*; 32: *op. cit.*

⁴¹ USDS FOIADocs. 197: Telegram State to Bonn Embassy 16 January 1993; 196: Telegram Bonn Embassy to State, 21 January 1993; 191: USAID Intelligence Synopsis, 3 March 1993; 185: Memorandum, Attorney-Adviser AID to Secretary of State, 17 March 1993.

⁴² USDS FOIADocs. 126: *op. cit.*

⁴³ We thank Ivo Daalder, Director for European Affairs, National Security Council (1995-1997), for discussion.